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TREATY POWERS: PROTECTION OF TREATY RIGHTS BY FEDERAL GOVERNMENT

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Mr. Bryce in his "American Commonwealth" points out that the Federal Constitution as it now stands, "with the mass of fringing decisions which explain it, is a far more complete and finished instrument than it was when it came fire new from the hands of the convention."¹ The truth of this assertion is evident to the student of our constitutional law. At the same time it must be remembered that, while the Supreme Court has "fringed" much of the text of the constitution with explanatory decisions, there yet remain many parts, and these by no means always of comparative unimportance, which have never been interpreted by the court, or on which there is still much room for speculation, in spite of the fact that they have been interpreted to some extent by our supreme judicial tribunal. Again, the fact that the framers did not attempt to describe the manner in which the powers conferred on the different departments of the federal government should be exercised, and "the laudable brevity" of the constitution have been made, and justly, the subject of favorable comment. But here, too, we must admit, that though the skill with which the constitution was drawn makes it one of the really great achievements of our race, it is not equally perfect in all its parts. Brevity and the statement of general principles not only may but do, in parts of the constitution, degenerate into intolerable uncertainty as to the real principle intended to be enunciated. In dealing with more than one subject of vital importance the language and the arrangement leaves room for wide speculation. As a result of this inequality in the skill of construction and in the amount of judicial interpretation, though we can ascertain with great particularity the answer to almost any question pertaining to certain clauses of the

¹Third Edition, Vol. I, page 254.

constitution, as, for example, the clause which gives Congress the power to regulate interstate and foreign commerce or the clause prohibiting the states from passing a law impairing the obligation of contracts, we are unable to give even a reasonable guess as to what would be the answer of the Supreme Court to many questions—and some of these of first importance—pertaining to other parts of the constitution. Unfortunately, there is perhaps no part of our fundamental law which is open to such diverse interpretation and which has received so little illumination from the court as that which relates to the treaty-power.

The second clause of the second section of the second article of the constitution provides that the President, "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." The second section of the sixth article provides: "This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitutions or laws of any state to the contrary notwithstanding." What is the nature of this treaty-power conferred on the President and Senate? When a treaty is negotiated and ratified does it become of its own force "the supreme law of the land" or is an act of Congress approving it or expressing its provisions necessary to give it the force of law?

It has been assumed by most of those who have studied the constitution that the very words of that document show that it was supposed by the framers that treaties would be self-executing. Thus, the second section of the sixth article treats the constitution, the laws of the United States, and treaties, as three distinct and separate sources of "supreme law." The second section of the third article, in conferring judicial power on the United States, also assumes the existence of these three distinct sources of "law," declaring that "the judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." Any doubt, however, which might exist on this subject has apparently been put at rest by the Supreme Court, which has, in a number of cases, regarded treaties as the "supreme law,"

though no act of Congress had been passed sanctioning their provisions.²

When we turn from the nature of the treaty-power to its extent we find greater possibilities for divergence of view. At the same time even here there is a general agreement on certain propositions. In the first place, it is apparently beyond question that the grant of treaty-power in the second article of the constitution is much more sweeping than the grant of legislative power in the first article. Congress is declared, not to have the power to make laws, but merely the power to make laws on certain enumerated subjects. On the other hand, the President and Senate have the power "to make treaties," the subject of a treaty, as far as the second article is concerned, being left entirely to their discretion. At the same time there is also a substantial agreement on the equally self-evident proposition that the constitution, like a contract between a principal and his agents, must be read as a whole, and that there may be, and are, limitations on the treaty-power to be found in other clauses of the constitution. For instance, the amendments from the second to the eighth inclusive enunciate certain individual rights and declare in general terms that these rights shall not be infringed. The rights so protected can no more be disregarded in a treaty than in an act of Congress. Again, the constitution provides to a certain extent for the organization of the federal government. The first article deals with the selection, organization and power of Congress; the second, in a somewhat similar way, with the executive; and the third, with the judiciary. It is admitted by all that the treaty-power can no more be exercised to alter this organization established by the constitution than the organization so established can be altered by an act of Congress. Neither can a power granted by the constitution, as the power to regulate interstate commerce, be in anywise modified by treaty. This, of course, is not saying that the treaty-power cannot also deal with those things over which Congress is granted legislative power. The question whether the powers granted to Congress over certain subjects exclude the exercise of any control of

²*Chirac v. Chirac*, 2 Wheaton's Reports, 259 (1817); *Orr v. Hodgson*, 4 Wheaton's Reports, 453 (1819); *Hughes v. Edwards*, 9 Wheaton's Reports, 489 (1824); *Carneal v. Banks*, 10 Wheaton's Reports, 181 (1825); *Hauenstein v. Lynham*, 100 United States Reports, 483 (1879).

these subjects by treaty is another and a different matter on which there is much difference of opinion. But all admit that a treaty regulating commerce which provided that Congress should have no power to alter its provisions by subsequent legislation would be, to the extent of this proviso, null and void.

There are many provisions in the constitution, however, the effect of which, if any, in limiting the treaty power is open to dispute. As an example of this class, we may take the second to the seventh clauses of the ninth section of the first article. The sixth clause, for instance, provides: "No money shall be drawn from the treasury, but in consequence of appropriations made by law." Suppose a treaty provides that a sum of money shall be paid; could the President take the money from the treasury without the sanction of an act of Congress? The writer would give a negative answer to this question, and such answer would be in accordance with the uniform practice of our government. At the same time, it can with some reasonableness be urged that these prohibitions are part of the first article of the constitution; that this article in its preceding sections has dealt only with the organization and power of Congress; that the first clause of the ninth section in terms prohibits, not all departments of the federal government, but "Congress" from interfering with "the migration or importation of such persons, as any of the states, now existing, shall think proper to admit, prior to the year one thousand eight hundred and eight"; and that, therefore, the prohibitions in the remaining clauses of the ninth section should be construed as limitations on Congress only. On the other hand, the prohibitions contained in these clauses are not in terms confined to prohibitions on legislative action, and that the evidence taken from the rest of the first article is not sufficiently conclusive to show an intent that they should be so limited. The tenth section prohibiting, as it does, the states from entering into "any treaty, alliance, or confederation," and from passing "any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts," shows that "law," whether by treaty or by act of Congress, is dealt with in the first article, and indicates that any restrictions in the article which are not in terms restrictions on Congress or the states should be regarded as general restrictions on all departments of the federal government.

A more difficult and doubtful question, however, is whether

any or all the powers granted to Congress in the eighth section of the first article are or are not exclusive? This question in any of its possible phases has never come before the Supreme Court. The practice of the government, when the question has arisen, has been to act as if the powers of Congress over matters entrusted to it by the first article were exclusive, and that a treaty dealing with any of these subjects, as, for instance, a treaty regulating custom duties, must have the sanction of an act of Congress before it can be regarded as the "law of the land." Even then if the power over imposts is, as contended, exclusive in Congress it is improper to call the treaty the "supreme law;" the "supreme law" is rather the act expressing or approving the terms of the treaty.³

To the writer the constitution of the United States should be interpreted from the point of view of an instrument creating for the people different agents on matters of vital importance. General treaty power is given to certain agents, the President and the Senate; particular legislative power is given to Congress. Whether any particular grant of power to Congress over a subject is to be taken as prohibiting an exercise of any control over that subject by the President and Senate in the form of a treaty, should depend, when there is no express direction in the constitution, on the nature of the subject. If it is a subject ordinarily only dealt with by legislative bodies, then it is reasonable to assume that the particular grant of control to Congress withdraws that subject from the treaty power. Now the great majority of the subjects over which Congress is given control fall under the category of subjects practically never dealt with by treaty. For instance, the power to lay and collect taxes, to coin money, to establish post offices and post roads, to constitute inferior judicial tribunals, to make rules for the government of the land and naval forces, all of these subjects and many more, control over which is granted to Congress, have rarely if ever been made the subject of contract between nations. Control over them having been given to Congress, we may infer that it was intended that the control should be exclusive. On the other hand, foreign commerce is a common subject of treaty and the

³For a history of the practice of the government see "Limitations on the Treaty-Making Power of the President and Senate of the United States," by Prof. Wm. E. Mikell, reprint from *University of Pennsylvania Law Review*, pages 18 *et seq.*

mere fact that Congress is given the power over foreign commerce should not be interpreted as curtailing the President and Senate from exercising a similar control in a treaty.

Whether the reasoning above indicated is or is not sound, whether the treaty power has or has not the right to deal with all or some or none of the subjects over which Congress has legislative power, though questions of importance, are not questions of fundamental or vital importance. Treaties require for their ratification a two-thirds vote in the Senate. It is unlikely that a treaty desired by two-thirds of the Senate would be disapproved by a majority of the House. It is probably easier to secure the passage of an act of Congress which requires only a majority in both houses than to secure the ratification of a treaty. We may be also fairly certain that a sufficient number of senators will always be found to adopt the theory that all powers granted to Congress are exclusive, to prevent the ratification of a treaty which deals with any subject entrusted to Congress by the first article of the constitution without the passage of an act authorizing the treaty. The questions are not of fundamental importance because their decision one way or the other does not deprive the United States of the power to make agreements with foreign countries touching all matters delegated to Congress. If such agreements cannot be made by treaty, they can be embodied in an act of legislation.

A far more vital difference of opinion arises over the question whether there are any limitations on the treaty power arising from what are known as the reserved powers of the states. The preservation of these "reserved powers" was the object of the tenth amendment. The amendment provides: "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Those reading this amendment in connection with the first and second articles of the constitution seem to follow one of two trains of reasoning. The intellectual descendant of Jefferson argues: The government of the United States is one of delegated powers. True, it has the power to make treaties; but on what subjects? It was not the intent of those who adopted the constitution to confer on the federal government power over their local affairs and police. The tenth amendment prohibits such an inference. Those who assert that the federal government has that power must show some

express grant. What are the powers delegated to the United States? They are those powers conferred on Congress by the first article, and, by necessary implication, the power to deal with matters external to the states. The schools of Hamilton and Marshall base their conclusions on a literal interpretation of the words of the constitution. That the United States is a government of limited power is admitted, but it is pointed out that the powers granted are to be determined, not by a supposed intent, but by the words used. The President with the concurrence of two-thirds of the Senate has power to make treaties. The tenth amendment treats of powers not delegated to the United States. The treaty power is delegated and, therefore, by the very words of the amendment outside its scope.⁴

The decisions of the Supreme Court in as far as they have involved the question should be noted. In *Chirac v. Chirac*,⁵ the court held, that the treaty of 1800 between the United States and France giving to French citizens the right to inherit land in the United States, superseded the law of Maryland which denied this right. Here is a decision that the federal government by treaty can deal with a subject not proper for federal legislation, and which relates to a matter which is not external to the states. More recently the Supreme Court in the case of *Hauenstein v. Lynham*⁶ held, in spite of a law of Virginia to the contrary, that a citizen of Switzerland had, under our treaty with that country, the right to the proceeds of the sale of land in Virginia. These are the most important cases, though there are others of similar import.⁷ In none did counsel or court contend that the federal government had not the right to negotiate the treaty or that when ratified it was not the supreme law of the land. Judge Swayne in *Hauenstein v. Lynham*, above cited, states the attitude which, without the felt necessity for explanation and defense, has always been taken. He says, "In the able argument before us, it was asserted upon one side, and not denied on the other, that if the treaty applies its efficacy must necessarily be complete. The only point of contention was one of construction."

⁴If the reader is anxious to examine the view first expressed he will find it set forth with pains and skill by the writer's associate, Prof. Mikell, in the article referred to, *supra*, note 3. The second view has recently been stated and defended by Senator Root. See 1 *American Journal of International Law*, 273.

⁵2 *Wheaton's Reports*, 259 (1817).

⁶100 *United States Reports*, 483 (1879).

⁷See cases cited, *supra*, note 3.

From these decisions we may conclude that it is settled law that the treaty power can be so exercised as to confer on aliens rights to property in the states which could not be conferred by act of Congress. They also settle in the negative the sweeping contention that the tenth amendment prohibits the treaty power from dealing with all matters not delegated to Congress and relating to the internal economy of the states. A treaty can be negotiated and ratified which will supersede state laws relating to rights of private property. On the other hand, it has never been held by the Supreme Court that the tenth amendment has no effect in limiting the treaty power. The question, for instance, whether the treaty power can be so exercised as to supersede state laws relating to health and morals has never been decided. It is true that there is apparently nothing in the text of the constitution to warrant a line being drawn between the power of the states to regulate the acquisition of real property, and the power to pass laws relating to gambling or diseased cattle, so that one could logically hold that the tenth amendment did not prevent the first class of laws from being superseded by treaty, but did prevent the last two classes of laws from being superseded. Law, however, is not necessarily logic; and besides, it must be remembered that a present member of the Supreme Court who believed that *Chirac v. Chirac* and *Hauenstein v. Lynham* proceeded on erroneous principles in disregarding the tenth amendment, while he might feel bound to follow these cases in a case presenting substantially identical facts, is not bound to follow what he regards as a wrong principle to all its logical consequences.

But even if we should regard the decisions which we have quoted as settling, forever, that the treaty power is in no wise limited by the tenth amendment, there is still another line of reasoning which renders uncertain the constitutionality of a treaty which would deal with matters subject to the police power of the states, using the term police power as including all laws which relate to the morals and the health of the people or their governmental organization and public activity. The constitution assumes the existence of the states. The states are as necessary a part of our federal state as the national government. All this is generally admitted, and from these admitted premises many students of the constitution draw the inference that any power granted to the federal government is subject to the implied limitation that it must not be

so exercised as to destroy a state. It is probable that any treaty which affected the organization of a state government, which attempted to alienate without the consent of a state, part or all of its territory, or which gave to aliens the right to share in the property or services of a state, as the right to use the public parks or the right to attend the public schools, would be considered unconstitutional. Whether a treaty which gave rights denied by the laws of a state passed to protect the morals or health of its citizens would be constitutional to a person holding this theory of implied limitation of power is not so certain, though it is likely that a treaty which permitted an alien to reside in a state, contrary to the opinion of the state that he being white, or yellow, or black would contaminate the morals of the people, would be regarded as tending to destroy the state, and therefore by implication beyond the power of the United States to make the supreme law of the land. When once a person adopts the theory of grants or limitations of power which arise, not from the text of the constitution, but from "the nature of things assumed to exist by the constitution" he is embarked on an uncertain sea whose boundaries will depend on his instinct, or, at the best, on shifting theories of the essential nature of our federal state. The judiciary with their power to disregard acts or treaties contrary to the constitution become more than the interpreters of a written instrument; they become the self-appointed guardians of a spirit of the constitution which the framers omitted to embody in the letter.⁸

The Supreme Court as such has never said that these implied limitations on treaty power exist, but several individual members of the court have, in the past, denied the power to override the police laws of the states, though it is not clear whether the judges referred to took this position because of the tenth amendment or because of some theory of implied limitation of power.⁹ The question is one of profound importance. If the treaties which run counter to state police regulations are not the supreme law of the land, any act of Congress which runs counter to a state police regu-

⁸For a discussion of this particular question see an article by the present writer in 55 American Law Register, entitled "Can the United States by Treaty Confer on Japanese Residents in California the Right to Attend the Public Schools?"

⁹See license cases, 5 Howard's Reports, 504, opinion of Daniel, J., p. 613; of Woodbury, J., p. 627; of Grier, J., p. 631; of McLean, J., p. 588. For other opinions along similar lines, see passenger cases, 7 Howard's Reports, 288.

lation is also of no effect. There is nothing, for example, peculiar in the power of Congress over interstate commerce, which would enable a law within the scope of this power, to override a law passed within the scope of the states police power, if a treaty within the apparent scope of the treaty power could not have that effect.

This summary of the uncertainties surrounding the extent of the limitations on the treaty power of the federal government shows the state of unfortunate confusion which exists as to its limitations. It is possible for one to hold any one of three theories:

First.—That as a result of the tenth amendment matters subject to the legislative power of the states, and not subject to any legislative power conferred on Congress are not subject to the treaty power.

Second.—That the treaty power is impliedly limited by the dual nature of our federal state; that the power cannot be so exercised as to interfere with the police powers of the states, using the term "police power" as including control over the organization of government, public property, public services, morals and health.

Third.—That the treaty power is not limited either by the tenth amendment or by any implied reservations arising from the nature of our federal state.

A fourth position is possible; namely, that the treaty power is limited by the tenth amendment as indicated in the first proposition, and also impliedly limited as indicated in the second proposition. The great practical difference in the results flowing from the adoption of one rather than another of these theories, will be seen if we apply each in turn to treaties purporting to confer rights on aliens.

Under the first theory we can by treaty confer on aliens the right of travel in any part of the United States, but not any rights of a resident in a state. The power of Congress to regulate interstate and foreign commerce has been given an interpretation sufficiently wide to make an act, and, therefore, under the theory a treaty, a regulation of commerce which relates to the journeying of persons, whether foreigners or citizens between the states, or between the United States and foreign countries. But a treaty guaranteeing to an alien any rights of residence or any protection as a resident would be beyond the federal government to make effective, because a law purporting to protect a citizen of the United States, resident

in a state, from assault is beyond the power of Congress to enact, and, therefore, under the theory beyond the treaty power. Likewise, a treaty purporting to confer on the citizens of a foreign country, being resident in that country, the right to make contracts with the citizens of the United States would be constitutional, because such contracts would also come within the power to regulate commerce with foreign nations; but once let the foreigner become a resident of a state, and if the laws of that state denied to foreigners being residents, the right to contract or to obtain property, or placed special restrictions on their commercial intercourse, no treaty could protect them. Their only redress, and it would be one of very doubtful efficacy, would be that portion of the first section of the fourteenth amendment of the constitution which provides; "nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

If we adopt the theory that the treaty power is limited by the very nature of our federal state, and also that as a result, the power cannot be so exercised as to interfere with the exercise by the states of their police power in the sense in which we have defined that term, any treaty conferring on aliens rights of travel, or residence would be powerless to confer on an alien the right of travel or of residence in any particular state except subject to those rules which the state regarded as necessary to preserve the morals, health and safety of its citizens. For instance, a state law which arbitrarily excluded all foreigners might be superseded by a treaty admitting the citizens of a particular country, but a state law which obliged all persons of African descent to reside in particular parts of a city, or to ride in "Jim Crow" cars would apply to a negro subject of Great Britain, traveling in that state, even though a treaty in terms stipulated that all persons being subjects of Great Britain should in traveling and residing in the United States, be subject only to those laws and regulations which pertained to white American citizens. In short, he who believes a treaty cannot supersede a state law passed under its police power might admit that a treaty would require a state to treat an alien, except as to political rights, as if he were a citizen, but he would probably claim that a treaty can confer on an alien no greater rights than those he would have if he were a citizen of the United States.

Lastly, if we adopt the theory that the tenth amendment in no wise limits the treaty power, and also deny any implied reservations on that power not found in the text of the constitution but arising from the nature of the federal state called into being by the adoption of the constitution, then all treaties granting to aliens rights of travel or residence in the states, or guaranteeing to them while residents protection from injury, and even treaties conferring rights in conflict with the police laws of the states, and vesting foreigners with the right to use the public property and obtain the public services of the states, would be constitutional. Of course, that treaties giving many of the above rights to aliens would be constitutional does not mean they might not violate that spirit of respect for local desires which should always influence the exercise by the national government of the powers entrusted to it. That a treaty which would override the reasonable laws of a state passed in good faith to protect the health or morals of her people, could be negotiated under present conditions by any President, or ratified by a two-thirds vote of any Senate is unthinkable. But the fact that a power may, theoretically, be abused is not an argument that it ought not, still less that it does not, exist. Generally, any power entrusted to government adequate to meet critical emergencies in legal theory may be used to defeat the very ends, the preservation of the nation, for which it was conferred.

When we turn from the nature and extent of the treaty power to the extent to which the federal government can protect rights granted by treaty we approach a subject on which, fortunately, there is little room for radical difference of opinion. The third section of the second article makes it the duty of the President to "take care that the laws are faithfully executed." He is also, by the second section of the same article, made "commander-in-chief of the army and navy of the United States." If a treaty is self-executing, it has when ratified by two-thirds of the Senate the force of law, and the President in the exercise of his constitutional duty "to take care that the laws be faithfully executed" has the right, unless prohibited by Congress, to use as a means to this end the army and navy of the United States. Congress by law may indicate the occasions when the army and navy shall be used, but in the absence of legislation the President has, under the constitution complete discretion to use the military forces of the United States to execute

its laws, subject only to the limitation that he cannot violate any general prohibition expressed in the constitution, as the prohibitions expressed in many of the amendments.

The President in executing his duty of enforcing a treaty, as in enforcing any law, is not limited to the employment of the military. He can use any other means which Congress has seen fit to place at his disposal. Thus, if Congress has created a secret service, and not by express provisions confined its use to subjects other than the enforcement of rights guaranteed by treaty, the President has the right to use the service to discover plots which if carried out would violate those rights.

Again, the President can call to his assistance any person or persons willing to lend such assistance. For instance, if a mob in one of our cities were about to assemble at a station to prevent aliens from getting off the trains on which they arrived, contrary to a treaty giving to them the right of travel in the states, the President could call "on all law-abiding citizens" to protect, by force, if necessary, the right of the aliens to leave the train. The citizen responding to the call would, of course, be liable if in attempting to enforce the treaty he violated a legal right. It is, to say the least, doubtful if Congress by legislation could prevent the President from securing voluntary assistance in the exercise of his constitutional duty to enforce law.

Finally, the President has the right to use any appropriate legal process for the enforcement of law, and therefore of treaties. The judicial power of the United States, by the second section of the third article "extends to all cases in law and equity arising under treaties made, or which shall be made, under their authority." But the extent to which any court of the United States may act depends wholly on affirmative congressional action. Congress not having made the violation of a right conferred by treaty a crime, the courts of the United States have no criminal jurisdiction over any alleged violation; and the President is at present without power to institute any criminal proceedings for the violation of a treaty right. Again, there is at present no law which gives the President a right to institute a suit for civil damages for the violation of such a right. General equity jurisdiction has, however, been conferred on the courts. By general equity jurisdiction we mean that jurisdiction which was exercised as a matter of custom by the High

Court of Chancery in England. In the main the nature of the jurisdiction is preventive. A person threatened with the violation of a right for which no adequate remedy in a suit for damages exists may bring a "bill in equity" praying that an injunctive order issue to restrain the threatened violation. By custom also, the attorney-general of England on behalf of the state could bring bills in equity to redress certain public wrongs. When, therefore, it is said that the courts of the United States have general equity jurisdiction we imply that the attorney-general of the United States may at the instigation of the President and on behalf of the United States bring any bill which the attorney-general of England could bring on behalf of the English government in the High Court of Chancery. The customary equity jurisdiction does not extend to all public wrongs; that is to say because an act is a violation of law does not necessarily enable the attorney-general to bring a bill in equity for its restraint. But by custom the jurisdiction of a court of equity does extend to the restraint of those wrongs which injure public property or which amount to a public nuisance. The word nuisance in this connection has received a wide interpretation. It means any act which prevents a number of persons in a community from exercising a right. If, therefore, a treaty guaranteed to all the citizens of Great Britain rights of residence in the United States, and we regard such a treaty as within the power of the President and Senate, if one Englishman resident in a state was denied those rights by anyone or more persons being private persons or officers of the state, a court of equity, while it might restrain the violation of the treaty at the private suit of the Englishman affected, would not entertain a bill in equity brought on behalf of the United States by the attorney-general. To give the attorney-general a right to bring the bill, a special statute requiring the federal courts to take jurisdiction would have to be passed. On the other hand, if there existed a movement on the part of one or more persons in a state to deprive all English subjects of the rights guaranteed to them by treaty, then such movement would constitute a public nuisance and the President could require his attorney-general to bring a bill in equity to secure an injunctive order restraining the wrong.

We have so far spoken of the power of the President to enforce a lawful treaty in the absence of any legislation by Congress

especially designed to insure obedience to treaties on the part of all persons within the United States. It is as certain as any proposition can be which has not been directly formulated by the Supreme Court in a case involving its application, that Congress has been given by the constitution power to pass any law legitimately designed to strengthen the enforcement of any treaty which it is within the power of the President and the Senate to make. The eighteenth clause of the eighth section of the first article not only gives to Congress the right "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers"—meaning the legislative powers conferred in the preceding seventeen sections—but it also confers the right to make all laws which shall be necessary and proper for carrying into execution "all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." The power to enforce the laws of the United States is a power vested in the President.

Acts designed to secure the enforcement of law may be roughly classed under three heads: administrative, penal and procedural. An act which would place at the disposal of the President, officers whose special duty it was to guard the persons of aliens would fall under the first class; a penal statute would be one which provided for the imprisonment or fining of anyone who violated any right given by treaty. Under the last head would fall any act which extended the jurisdiction of the courts of the United States in cases involving alleged violation of treaty rights, or any act which directed the procedure to be followed in any such case. For instance, an act which enabled the President to direct the attorney-general to bring a bill in equity for an injunctive order to protect an individual alien threatened with a violation of a right conferred on him by treaty would fall under this class.

Of course, these statutes must not violate any prohibition contained in the constitution. The administrative statute must not authorize those "unreasonable searches and seizures" prohibited by the fourth amendment; the penal statute must not deny to the accused "a speedy and public trial," contrary to the sixth amendment, and the procedural statute must not confer original jurisdiction on the Supreme Court contrary to the second clause of the second section of the third article. But within the limitations men-

tioned it is almost impossible to think of an act reasonably designed to enforce a treaty that would be unconstitutional.

That the act must be "reasonably designed to enforce the treaty" is clear. The constitution does not say that Congress shall have power to make any law which *it thinks* necessary and proper for carrying into execution a power vested by the constitution in any department or officer of the government, but merely that Congress shall have power to make those laws which shall be *necessary and proper* for carrying into execution a power vested. Under this grant Congress has a wide choice of means to be used; but the means must bear some reasonable relation to the end, which is the execution of the power, and the Supreme Court has the final right and duty to pass on the question whether the means used bears sufficient relation to the power to make it within the right of Congress to select that means to enforce the power. Take as a concrete instance: A treaty guarantees protection to aliens traveling in the United States. A federal statute making it a crime to attack an alien, as such, while traveling, contrary to the right conferred by the treaty, would be without question a proper means of enforcing the treaty. But suppose the act should go farther than this and make anyone who wilfully injured an alien subject to indictment. As in terms the statute supposed does not require that it must be shown that the accused knew that the person he injured was an alien, if A in a quarrel kills B, not knowing that B is an alien, he would, nevertheless, be indictable under the statute. The constitutionality of such a statute is far from certain. The end,—the enforcement of the treaty,—and the means,—the punishment of one who killed another whom he did know was an alien,—would, at least, in the opinion of the writer, fail to bear sufficient correspondence to sustain the act. The question, of course, is an academic one. It is not likely that Congress will ever in our day do more than make the wilful attack on aliens, as aliens, criminal.

Thus, the means which are unquestionably within the power of the federal government, if properly used, would appear to be ample to enforce all treaties. The doubts, and they are many which surround the subject we have discussed, are, as we have seen, as to the extent of the treaty power, not as to the right of the United States to maintain respect for, and punish violations of, those treaties which it may lawfully make.